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# THE HIDDEN EQUITY

## An Analysis of the Moral Content of the Principles of Equity

By RALPH A. NEWMAN\*

THE importance of equity in the structure of law has been recognized since classical antiquity and beyond, but its precise nature has proved difficult to define. There are those who have despaired of arriving at a definition,<sup>1</sup> and it has been suggested that it is safer to describe equity than to attempt to define it.<sup>2</sup> There is no doubt that for long periods equity has constituted in many legal systems a valuable force in introducing into the law elevated standards of conduct which are thoroughly accepted in all systems of ethics and morals, and in eliminating practices which except in the law are almost universally condemned. A leading civilian jurist has referred to equity as one of the names under which is concealed the creative force which animates the life of the law.<sup>3</sup> Serious doubt has been expressed, however, whether, in legal systems whose norms have been shaped by moral considerations, equity may not have ceased to serve any useful purpose, and whether it should not be allowed to disappear as a separate component of law.<sup>4</sup> In most civil law systems the fundamental principles of equity are applied as a matter of course in all situations in which they are relevant.<sup>5</sup> In the common law system we are not only uncertain as to just what equity is, but as to just what to do with it, whatever it may be. What we actually do with it is very surprising. We apply the principles of equity in some areas of law, but we

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<sup>1</sup> "Unless one lures himself with the mirages of metaphysics, equity escapes any logical definition." H. DE PAGE, *A PROPOS DU GOUVERNEMENT DES JUGES; L'EQUITE EN FACE DU DROIT* 161 (1931), *quoted in* Razi, *Reflections on Equity in the Civil Law System*, 13 AM. U.L. REV. 24, 26, n.13 (1963). "Equity has at no time lent itself to very exact definition." Hanbury, *The Field of Modern Equity*, in *ESSAYS IN EQUITY* 23 (1934).

<sup>2</sup> 2 J. BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* 581 (1901).

<sup>3</sup> J. Puig Brutau, *Juridical Evolution and Equity*, in *ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND* 82, 84 (R. Newman ed. 1962). Similar importance has been attached to equity by H. CAPITANT, *REVUE TRIMESTRIELLE* 371 (1928); LEVY-ULLMAN, *LE SYSTEME JURIDIQUE DE L'ANGLETERRE* 564 (1928).

<sup>4</sup> D. KERLY, *HISTORY OF EQUITY* 292 (1890); Lasswell & McDougal, *Legal Education and Public Policy*, 52 YALE L.J. 203, 255 (1943): "Equity. What useful purpose is served by putting this rag-bag of stuff between two covers?" Maitland at times thought of equity as "a short sighted busybody." Fratcher, *Book Review, Letters of William Maitland*, 19 J. LEGAL ED. 122, 125, n.24 (1966).

<sup>5</sup> "For a continental judge law and equity are not opposites, but equity is an integral part of the law." A. ROSS, *ON LAW AND JUSTICE* 284 (1959).

fail to apply them in other wider areas in which they are equally relevant. We recognize the fact that the principles of equity impose higher standards of moral conduct than the standards of common law,<sup>6</sup> but the question of why these elevated standards are not applied throughout the law is seldom raised, even by those who emphasize the importance of such standards in the moralization of law.

Analysis of the nature of equity is made still more difficult by the fact that equity is always in transition. "A part of what is now strict law was formerly considered as equity; and the equitable decisions of this age will unavoidably be ranked under the strict law of the next."<sup>7</sup> In the unending process of conforming legal norms to the currently accepted moral standards of society, lawmakers commonly use the word equity to mean what is fair and just;<sup>8</sup> but since the aim of all law is to do justice, this sense of the term leads only to an identification of the role of equity with the role of law, and provides little

<sup>6</sup> "There are many duties that belong to the class of imperfect obligations which are binding on conscience, but which human laws do not and cannot, undertake to enforce. But when the aid of a court of equity is sought to carry into execution such a contract, then the principles of ethics have a more extensive sway; and a purchase made with such a reservation of superior knowledge would be of too sharp a character to be aided and forwarded in its execution by the powers of the Court of Chancery." 2 KENT, COMMENTARIES \*490.

"An agreement, to be entitled to be carried into specific performance, ought to be certain, fair, and just in all its parts. Courts of equity will not decree a specific performance in cases of fraud or mistake, or of hard and unconscionable bargains." 2 J. STORY, EQUITY § 769 (13th ed. 1886).

"If then . . . the plaintiff has obtained [the agreement] by sharp and unscrupulous practices, by overreaching, by trickery, by taking undue advantage of his position, . . . or by any other unconscientious means,—then a specific performance will be refused." 4 J. POMEROY, EQUITY JURISPRUDENCE § 1405(a) (5th ed. 1941).

These statements by giants of the law have been reiterated, without critical analysis of the distinction, in modern times. *E.g.*, *De Garmo v. Goldman*, 19 Cal. 2d 755, 765, 123 P.2d 1, 6 (1942); *Dale v. Jennings*, 90 Fla. 234, 246, 107 So. 175, 180 (1925); *Mainelli v. Neuhaus*, 157 Neb. 392, 396, 59 N.W.2d 607, 610 (1953); *Bowker v. Cunningham*, 78 N.J. Eq. 458, 461-63, 79 A. 608, 610 (Ch. 1911); *Sullivan v. Jennings*, 44 N.J. Eq. 11, 14 A. 104 (Ch. 1888); *Cuff v. Dorland*, 50 Barb. 438 (N.Y. 1878), *rev'd*, 55 Barb. 481 (N.Y. 1876). See generally RESTATEMENT OF CONTRACTS § 367(a), -(b), -(c), comment a (1932).

<sup>7</sup> MILLAR, HISTORICAL VIEW OF ENGLISH GOVERNMENT Bk. II, ch. vii quoted in R. Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 24 (1905).

<sup>8</sup> C. ALLEN, LAW IN THE MAKING 405 (6th ed. 1958); 2 J. AUSTIN, LECTURES ON JURISPRUDENCE 639-40 (3rd ed. 1869); DIGEST 1.1.1.3: "Honeste vivere, neminem laedere, suum cuique tribuere"; W. FRIEDMANN, LAW IN A CHANGING SOCIETY 453 (1959): "'General Equity' is a means of infusing legal ideals; the creative function of judicial equity, fairness, common sense or justice has translated itself into numerous practical applications;" Holdsworth, *Reception of Roman Law in the Sixteenth Century*, 28 L.Q. REV. 236, 239 (1912): "[Equity is] that which is right." H. JOLOWICZ, LECTURES ON JURISPRUDENCE 262 (1963): "Equity . . . is simply a tendency to look to the spirit rather than to the letter of the law and to apply general ideas of what is fair rather than specific rules."

guidance for determining the function of equity itself. There has been a serious dearth of inquiry into a more precise meaning of what might be called pure equity, to distinguish it from equity in the sense of what is fair and just. Most efforts to systematize equitable doctrine in collections of principles have failed to penetrate to the underlying concepts from which the principles have been derived. As Lord Evershed has said, "the principles of equity illustrate, nay illuminate, but never precisely define, the concept which lies behind, understood but unexpressed."<sup>9</sup> Modern research into the nature of equity has manifested an unfortunate tendency to look at equity as a system of remedies<sup>10</sup>—an approach which distracts attention from the nature of the substantive rights and duties which the equitable remedies enforce. The prevailing uncertainty in all legal systems as to the nature of equity is due largely to inadequate analysis of the nature of the fundamental concepts upon which the principles of equity rest. The truth is that there is no such "thing" as equity. Equity is neither a system nor a process, but is a method of adjusting conflicting interests in accordance with ideals of decent and honorable conduct in an ethically maturing society.

At the dawn of recorded history there is a wide gap between law and morals. The predominating need of the social group is peace and security, and law at this stage of social evolution is primarily an instrument for group survival. The consequences of violation of the law must be certain and inexorable, requiring rigid rules which deal with ordinary situations falling into definite categories.<sup>11</sup> The standards by which conduct is to be judged are determined by the needs of the community as a whole rather than by the needs of the individuals immediately concerned.<sup>12</sup> Since at this stage of the evolution of law certainty is more important than individual justice, circumstances which present variations from the ordinary situations are ignored. As Saint Thomas said, the lawmaker cannot have in mind every single case. Since the beginnings of law the gap between law and morals has narrowed, but there are reasons why the gap can never be completely overcome. There is no doubt that for a time, after the emancipation of law in the 16th century from the claim of the Universal Church to a monopoly of moral authority, apprehension of the loss of the law's newly won autonomy was responsible for the insistence on

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<sup>9</sup> R. EVERSLED, *ASPECTS OF ENGLISH EQUITY* 17 (1954).

<sup>10</sup> See, e.g., C. CLARK, *PLEADING AND PROCEDURE* (1930), where the author put all equity except relief for mistake, fraud, and unjust enrichment into his casebook on procedure.

<sup>11</sup> "The rules of primitive knowledge usually occur as imperative, or, at least, normative statements, since they are formulated invariably so as to fit pragmatic concepts." Malinowski, *A New Instrument for the Interpretation of Law—Especially Primitive*, 51 *YALE L.J.* 1237, 1243 (1942).

<sup>12</sup> R. POUND, *INTRODUCTION TO THE PHILOSOPHY OF LAW* 14-15 (1954).

rigid norms which would be impervious to modification on moral grounds.<sup>13</sup> Voltaire, who lived for many years in England, felt that one of the primary achievements of law in that country was the right of every man to be judged in any matter only according to precise laws.<sup>14</sup> In modern times a similar reluctance of law to accept moral standards as an element of its norms is due to the fact that the application of moral standards requires examination of circumstances which vary widely from case to case, leaving an important part of the judicial process to discretion. Since the reception of the principles of equity into the norms of law takes place through the substitution of flexible principles in place of rigid rules, distrust of the discretion of judges has continued to retard the reception of equity.<sup>15</sup> A more basic reason for the reluctance of law to receive without reservation the principles of equity is what Radbruch has called the antinomy between legal certainty and justice.<sup>16</sup> There exists in law an inherent conflict between the goal of certainty, so important to the maintenance of social order, and the goal of justice, so important to the individual. In systems of ethics and morals there are no finite limits to the extent to which standards of upright and humane conduct can be accepted as blinding norms. In law, since law must be not only humane but certain, individual justice must yield in many situations to the interests of society as a whole. "The law insists on form, equity and natural law on justice in the ethical sense."<sup>17</sup> "Every ethic," Bronowski says, "must hold a man within his society, and yet it must make him feel that he follows his own free bent. No ethic is effective which does not link both these, the social duty with the sense of individuality. The sense of human dignity creates the universal identity of man."<sup>18</sup>

The necessity for legal norms which are flexible enough to permit their application to particular circumstances has been noted by great thinkers since Homer.<sup>19</sup> To Plato, equity meant a breaking away

<sup>13</sup> Referring to the apprehension of the possible consequences of a wide discretion on the part of judges, on the establishment in Massachusetts of a court of equity after 250 years, see Woodruff, *Chancery in Massachusetts*, 5 L.Q. REV. 370, 379 (1889).

<sup>14</sup> See VOLTAIRE, *PHILOSOPHICAL DICTIONARY, Government*, (1843) cited by W. DURANT, *THE AGE OF VOLTAIRE* 247 (1965).

<sup>15</sup> See Clark, *The Limits of Judicial Objectivity*, 12 AM. U.L. REV. 1 (1963).

<sup>16</sup> G. RADBRUCH, *VORSCHULE DER RECHTSPHILOSOPHIE* 3 (1959).

<sup>17</sup> R. POUND, *THE SPIRIT OF THE COMMON LAW* 141 (1921).

<sup>18</sup> J. BRONOWSKI, *THE IDENTITY OF MAN* 106 (Eng. ed. 1967).

<sup>19</sup> PLATO, *LAWS*, Bk. I, 640(b), quoting HOMER, *ODYSSEY*, Bk. IX, ii, 112-15:

Mootless are they and lawless. On the peak of mountains high  
They dwell in hollow caves,  
Where each his own law deals to wife and child  
In sovereign disregard of all his peers.

from what is precise.<sup>20</sup> In classical antiquity equity corrected failures of justice which occurred because of the inability of strict law to adjust its rigid rules to unusual circumstances. At first, relief was given in the form of royal dispensation.<sup>21</sup> As society becomes more humane, the rules of law soften so as to enable the judge to take into account circumstances which vary from one case to another. The recognition of moral values as falling within the province of law left the criteria of decisions much less clearly defined. The distinction between the rigid rules of strict law and the flexible principles of equity was especially evident in the Anglo-American system of administration of law and equity in separate courts. An equity which corrected the law by applying standards so obscure as to preclude objective evaluation would itself be lawless,<sup>22</sup> and in 19th century a reaction set in which led to a hardening of the norms which had been established in the Court of Chancery, a phenomenon which had occurred in Roman praetorian equity 2,000 years before. In the contemporary stage of the evolution of law there is urgent need for legal norms which will permit necessary flexibility of application and yet provide adequately for certainty. To do this, it is necessary to reduce to more precise formulation the basic concepts by which the moral content of law is to be determined. If men were angels, the standards of ethics and morals would provide the moral content of all legal norms. Since men are less than angels, the need arises for a pure equity to provide specific statement of the moral objectives of law. As Northrop has said, "Law provides ethics with explicitly expressed content as formulated by the people themselves of a given culture."<sup>23</sup> There are of course many factors which enter into the requirements of justice, but almost all schools of legal philosophy agree that morality is one of the essential elements of law.<sup>24</sup> The necessity even in early law for royal dispen-

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<sup>20</sup> PLATO, *LAWS*, Bk. VI, 757(d), -(e). Aristotle said that equitable justice considers the unique individual circumstances which demand a departure from the rigid rules. ARISTOTLE, *NICOMACHEAN ETHICS* 1131 (Ross transl.).

<sup>21</sup> "Let any oppressed man, who has a cause, come before my image as king of righteousness." CODE OF HAMMURABI (cir. 1961 B.C.) (closing statement). See 2 S. PUFENDORF, *THE ELEMENTS OF UNIVERSAL JURISPRUDENCE*, 164-65 (W. Oldfather transl. 1931) (Pufendorf wrote in 1660).

<sup>22</sup> R. POUND, *supra* note 12, at 54: "There has been a continual movement in legal history back and forth between wide discretion and strict detailed rule, between justice without law, as it were, and justice according to law."

<sup>23</sup> F. NORTHROP, *THE COMPLEXITIES OF LEGAL AND ETHICAL EXPERIENCE* 183 (1959).

<sup>24</sup> J. GRAY, *THE NATURE AND SOURCES OF LAW* 303 (2nd ed. 1921): "In all civilized societies the courts are impliedly directed to decide in accordance with the precepts of morality."

P. VINOGRADOFF, *COMMON SENSE IN LAW* 247 (1914): "The . . . view that in an enlightened age positive law has to be estimated by the standard of moral ideals seems to be incontestable."

For a similar view of the relationship between law and morals, see R.

sation in situations in which the law's departure from the community's sense of justice was very great, evidences the inescapable connection between law and morality. The history of the evolution of law is largely the history of its reception of doctrines which embody, to an ever increasing extent, standards of conduct which correspond to the moral convictions of society. It is to the role played by equity in the moral growth of the law that this study is directed.

In some legal systems the body of humane doctrine which in early times corrected the inadequacies of strict law was for long periods administered as a separate system within the general framework of the entire legal system. In most parts of the world the two systems ultimately coalesced, and equity as a separate element of law disappeared. For reasons which I have attempted to examine elsewhere,<sup>25</sup> this absorption of the principles of equity into the total legal system did not take place in Anglo-American law. There, equity and law continued for centuries to flow in separate channels, and were administered in separate courts. Beginning about the middle of the 19th century, in both England and the United States, separate courts of equity were abolished;<sup>26</sup> but by the time this happened, the habit of confining equitable doctrine to certain well defined areas of law had taken hold of the judicial mentality too firmly to be easily dislodged.<sup>27</sup> We have become in a sense the victims of history, and even though equity and common law are now administered in a single court, equity is still treated by us as a separate system. We continue to confine the application of equitable doctrine largely to suits for specific relief, although the nature of the remedy which is sought or is available has nothing to do with the relevance of equitable doctrine to substantive rights. Only imperfectly and sporadically have the principles of equity permeated into the mainstream of our law. In Roman law praetorian equity was administered along with the rules of strict law in the same court;<sup>28</sup> but the long experience of administration of equity in a separate court in Anglo-American law has allowed the principles of equity to work themselves pure and has preserved their identity, enabling them to serve as a catalyst for determining the degree of the humanization of all legal systems.

The difficulty of formulating standards of moral conduct which can be tested empirically lies at the root of much of the conflict be-

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STAMMLER, *WIRTSCHAFT UND RECHT* 181 (2nd ed. 1905), and MacMillan, *Law and Ethics*, 49 *SCOT. L. REV.* 61, 64 (1933).

<sup>25</sup> R. NEWMAN, *EQUITY AND LAW: A COMPARATIVE STUDY* ch. 2, at 21 (1961).

<sup>26</sup> *Id.* at 51.

<sup>27</sup> "The dual system of law and equity still exists." Boardwell, *Equity and the Law of Property*, 20 *IOWA L. REV.* 1, 47 (1934).

<sup>28</sup> Praetorian equity began in 356 B.C. and lasted until the reign of Hadrian. See H. JOLOWICZ, *supra* note 8, at 263.

tween the positivist and naturalist schools of legal philosophy. Even scientific norms often rest, however, on concepts which are not susceptible of empirical verification; Bronowski has pointed out that thought does not survive without symbolic concepts,<sup>29</sup> and Einstein has said that modern physics would be impossible unless concepts going beyond observed facts are introduced and tested by their deductive consequences.<sup>30</sup> All truth is susceptible to test, since otherwise we could not tell what is true. The world of what ought to be, just as the world of what is, is subject to verification,<sup>31</sup> but the absence of norms which can be tested empirically does not impair the validity of postulates in establishing the nature of moral concepts such as reason, justice and equity. Equity has approached the problem by formulating standards of conduct with due allowance for variation in exceptional situations,<sup>32</sup> refuting Brecht's conclusion that the gulf between the existential and the normative is unbridgeable.<sup>33</sup> Such standards constitute adequate guides for decision, and so point the way to justice.<sup>34</sup> The problem is to formulate norms of conduct which will establish an equilibrium between law which is just from the viewpoint of the interests of society as a whole, and law which is just to the individual—an equilibrium which Saint Thomas called the golden mean of moral virtue.<sup>35</sup>

Across the life of the law it is possible to trace the various streams by which the law has become increasingly humanized. In one of the earliest civilizations of which we have a written record, Israel, the concepts of morality were an integral part of the law, as early as the time of the unknown writer or writers of the Book of Leviticus.<sup>36</sup> Out of Judea came the first plea for human brotherhood,<sup>37</sup> the first

<sup>29</sup> J. BRONOWSKI, *SCIENCE AND HUMAN VALUES* 51 (1959).

<sup>30</sup> A. EINSTEIN, *THE WORLD AS I SEE IT* 35 (1935).

<sup>31</sup> Cairns, Book Review, 5 *NATURAL L.F.* 139, 144 (1960).

<sup>32</sup> H. CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* 463 (1949).

<sup>33</sup> B. BRECHT, *POLITICAL THEORY, THE FOUNDATION OF TWENTIETH-CENTURY THOUGHT* 409-13 (1959). Plato takes a view which corresponds to that of Cairns; one must "accept the best of human arguments, the hardest to refute, and risk riding on this raft, as it were, in the voyage through life." *PLATO, PHAEDO* 85, c, d.

<sup>34</sup> The Hebrew word for law, *halakha*, is derived from a word meaning literally "to point the way." See Cohn, *Prolegomenon to the Theory and History of Jewish Law*, in *ESSAYS IN HONOR OF ROSCOE POUND* 44, 48 (R. Newman ed. 1962).

<sup>35</sup> ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* II.ii.60.art 2.

<sup>36</sup> *Luke* 10:29 (King James): "Who is thy neighbor?" is asked out of the context of *Leviticus* 19:18 (King James): "Thou shalt love thy neighbor as thyself." See also *Leviticus* 19:34 (King James).

<sup>37</sup> See 1 G. SARTON, *THE HISTORY OF SCIENCE* 63 (1931): "Mosaicarum et Romanarum Legum Collatis" (attributed to Rufinus, cir. 400 A.D.). This indicates that "the Roman Empire sought to find the rational validity of its laws in the roots of a Divine Law—to express in its law the necessity of



formulation of the moral consciousness of mankind.<sup>38</sup> A remarkable spiritual development which took place from the eighth to the sixth centuries before the Christian era is most strikingly expressed in the teachings of Hosea,<sup>39</sup> Amos<sup>40</sup> and Isaiah.<sup>41</sup> A somewhat parallel moral revival found expression in the theory of natural law of the Greek Stoics in the fifth and fourth centuries before Christ. When Jewish law became secularized in the fifth century B.C.,<sup>42</sup> the precepts of the Divine Law remained an integral part of secular law. The vision of righteousness and human brotherhood of the Prophets of the Old Testament was carried by Jesus into Christian doctrine as the concept of charity,<sup>43</sup> which found supreme expression in the Sermon on the

human brotherhood through Divine Fatherhood." Benas, *Some Jurists and Humanists*, 41 JURID. REV. 205 (1929).

<sup>38</sup> W. DURANT, OUR ORIENTAL HERITAGE 935 (1954).

<sup>39</sup> Hosea 6:6, 10:12, 12:6 (King James).

<sup>40</sup> Amos 5:24 (King James).

<sup>41</sup> Isaiah 59:14 (King James). See also Leviticus 19:15, 19:18, 19:34 (King James): "Thou shalt love him as thyself; for ye were strangers in the land of Egypt."

<sup>42</sup> In 444 B.C., as related in *Nehemiah* 10:29 (King James).

<sup>43</sup> The rabbinic teaching of love was basic to the teaching of Jesus. J. BOWLE, WESTERN POLITICAL THOUGHT ch. VII (*passim*) (1947), cited in F. STONE, HUMAN LAW AND HUMAN JUSTICE 30, n.101a (1965). The stream of Jewish influence, in which justice and law were inextricably interwoven and even identified with each other (See MENDENHALL, LAW AND COVENANT IN ISRAEL AND THE ANCIENT NEAR EAST 16 (1955)), exercised its effect through the fact that, by the Middle Ages, natural law had been in contact, through Roman law and apart from Roman law, with the Judeo-Christian moral system. Paul's concept of charity (1 *Corinthians* 13 (King James)) meant love and concern for one's fellow men. See also 4 DUNS SCOTUS, OPUS OXONIENSE 25.3, 17 (circa 1300). The American Standard Revised version of the Bible translates a Greek word, which is translated in the King James version as "charity," by the word "love." 1 *Corinthians* 13:13 (King James). The center of Christian ethics—the triumph of the individual in his renunciation of self—is stated in *Luke* 17:33 (King James): "whoever seeks to save his own soul loses it, and he who loses his soul shall live;" and in *John* 12:25 (King James): "he who loves his soul shall lose it, but he who renounces it will assure it eternal life." The thought receives more exact expression in the French Bible of Crampton, which uses in a note the Greek word of the text of *Luke* 17:33 (ζωογονήσει), "regenerate," "to be born again." See A. GIDE, JOURNALS 1889-1949, at 270, 275 (1947).

Thus the overriding concept of love constituted the contribution to moral advance, and through the spirit of Christianity, this element of justice pervaded all Western thinking. The importance of the doctrine of the Old and New Testaments in the development of Western thought is referred to by SAINT THOMAS AQUINAS, SUMMA THEOLOGICA 1-2, 91, 4. Justice in Biblical law is expressed in terms of charity in Christian doctrine. "Rabbinic adages constantly encourage working for the welfare of mankind and sacrificing individual interests for the sake of peace. . . . The duties of charity play a more and more significant role." BONSIIVEN, PALESTINIAN JUDAISM IN THE TIME OF JESUS CHRIST 146 (Wolf transl. 1964). "The figures of Christ and the Church assume their proper significance only in the light of the divine realities already present in Palestinian Judaism." *Id.* at 260. "Judaism, and primarily the Jewish law, is the bridge between the two testaments." *Id.* at 252. Bongiiven was a priest of the Jesuit Order (The Society of Jesus).

Mount.<sup>44</sup> Although the effect of Christianity in humanizing specific institutions of post-classical Roman law has been argued,<sup>45</sup> it is difficult to identify any effect of Christian doctrine on the basic moral principles of Roman law, because by the time of the Christian emperors, its moral doctrines, based on concepts of natural law, had taken definitive form.<sup>46</sup> It may fairly be said that until the Middle Ages the Judaic-Christian ethic remained isolated from Western jurisprudence.<sup>47</sup> The 12th and 13th centuries witnessed a revival in Western Europe of natural law, which during the Dark Ages had lain buried and forgotten. In the 13th century Saint Thomas combined the fundamental ideal of the brotherhood of man—more vast, as Del Vecchio has pointed out, than the Stoic philosophy<sup>48</sup>—, Roman law, the teach-

<sup>44</sup> *Matthew* 5:3-7 (King James); *Luke* 6:20-49 (King James).

<sup>45</sup> "The influence of Christian doctrine is widely revealed in the sense of a gradual mitigation and humanization of many juridical institutions; for example, in promoting a greater concern for good faith, of forbidding the abuse of rights of property, of favoring the support of charitable foundations, especially for the relief of poverty, of combating divorce, adultery and exposure of infants to death, and the cruelty of punishments and of gladiatorial combats." G. DEL VECCHIO, *LEZIONI DI FILOSOFIA DEL DIRITTO* 23 (13th ed. 1965). See Marchi, *Dell' Influenza du Christianesimo sulla codificazione giustiniana*, 38 *STUDI SENSE* (vol. XIII, 2d ser.) 61, 100 (1924) (this source was located at the University of Rome through the courtesy of Professor Del Vecchio).

<sup>46</sup> What may have been a direct source of Roman law moral principles is *Codex Justinianus* 3.1.8, based on a year 314 decree of Constantine: "Placuit in omnibus rebus praecipuam esse iustitiae aequitatisque quam stricti iuris rationem;" cf. *CODEX* 1.14.1. See also Marchi, *supra* note 45. The actual effect of this provision on the subsequent application of the moral doctrines of Roman law as they had been developed by the end of the classical period, 235 A.D., seems to rest only on conjecture. See generally TROPONG, *DE L' INFLUENCE DU CHRISTIANISME SUR LE DROIT CIVIL DES ROMAINS* 3-67 (1844). Buckland has remarked that although Justinian's compilers were instructed to make necessary changes in the material, which was taken from books written at least 3 centuries earlier, there was no drastic change of doctrine. Buckland, *Interpolations in the Digest*, 33 *YALE L.J.* 343, 345 (1924).

<sup>47</sup> Durant attributes the obstruction, for a millenium, of the direct interchange of Oriental and Occidental ideas, to the fall of Rome and the Moslem conquest of the routes between Europe and India. W. DURANT, *supra* note 38, at 554.

<sup>48</sup> "The fundamental ideal of Christianity—the brotherhood of man in God, is more vast and more elevated than the Greek concept of the Classical period. The Stoic philosophy was the prelude to Christianity. The influence of Greek and especially Stoic philosophy gilded to a great extent the doctrine of Roman jurisprudence through natural law, superimposed on positive law. In the Middle Ages this concept of natural law was transmitted by the canonists, in the form of the scholastic philosophy of St. Thomas. Thus the essential elements of classical thought were preserved and found a new life." G. DEL VECCHIO, *supra* note 45, at 22.

"Available data authorize the conclusion that from the seventh to the eleventh century the historical books of the Old Testament constituted the chief source of the ideas of international law relationships. In the decree of Gratian even a simple fact of Biblical or ecclesiastical history sometimes serves as a source of law." Petrazycki, *Law and Morality*, in 7 *TWENTIETH CENTURY LEGAL PHILOSOPHY SERIES* 283-84 (1955). "[T]he law existing at

ings of the Church Fathers (principally those of St. Augustine), natural law,<sup>49</sup> and institutions of Germanic law,<sup>50</sup> closely related to natural law. The swelling stream of jurisprudence developed by the scholastic philosophers of the Middle Ages, augmented by institutions of the customary law of France,<sup>51</sup> became the source of the civil law systems of the European continent. In the 13th century the influence of the *Decretal* of Gratian, embodying the basic moral doctrines of Roman law and Biblical law,<sup>52</sup> was carried by the Dominican and Franciscan canonists to England.<sup>53</sup> There the canon law pro-

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a given time rests upon facts of the remote past . . . as normative facts . . . such as statements of the New Testament." *Id.* at 284. He states that modern law rests not only on Roman law and contemporary European law, as the positivists assume, but also has rested, and still rests, for thousands of years on other sources such as Mohammedan and Hebrew law. *Id.* at 283. "The basic and most authoritative normative facts of the development of Christian law were the sayings of those who had attained lofty religious authority—that is, on sacral law." *Id.*

<sup>49</sup> L. PETRAZYCKI, *supra* note 48; P. VINOGRADOFF, *ROMAN LAW IN MEDIEVAL EUROPE* 86 (1929); see J. DAWSON, *RELIGION AND THE RISE OF WESTERN CULTURE* 59, 61, 73 (1958), which refers to the role of Saint Augustine in the fifth century.

<sup>50</sup> Ehrlich points out that the positive material which was introduced into natural law by the medievalists was largely taken from German and French law and institutions of trade. E. EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 421 (Moll transl. 1913), cited in F. STONE, *supra* note 43, at 61. Ehrlich also recognizes "the great transformation . . . of the whole ethical view of life that has been brought about by the Christian religion." *Id.* at 459.

<sup>51</sup> The revival of jurisprudence in southern France in the latter half of the 11th century was accompanied by the elimination of "anything in the law contrary to equity." *EXCEPTIONES PETRI* (Excerpts of Peter; written by an unknown author); F. SAVIGNY, *GESCHICHTE DES ROMISCHEN RECHTS IM MITTELALTER* 11, app. I(a) (1834). Vicarius, in his Gloss on the CODE AND DIGEST, *Liber pauperum* (12th century), discusses as a major problem the treatment by the glossators—Inerius, Bulgarus, Azo, Accursius and others—of the relation between law and equity. Laws must be interpreted in a humane way so that there should be no discrepancy with equity. Gloss on the CODE AND DIGEST, *Summa Trecensis* I.14.6,7 (attributed to Inerius). In Appendix IV of this Gloss, the author points out the danger in such a wide power to modify the law on the part of the judge. The Roman views were transmitted to the courts of customary law through the channels of the ecclesiastical tribunals. BEAUMANTOR, *COUTUMES DE BEAUVAISES* §§ 1279-83 (1889-90).

<sup>52</sup> In GRATIAN, *DECRETUM* (circa A.D. 1140), the author declared that the natural law is what is contained in the *lex*—the Mosaic law, chiefly the Ten Commandments, and in the Evangels. "Through the Church there entered into Europe a patent leaven of Judaic thought. The laws of Moses as well as the laws of Rome . . ." Isaacs, *The Common Law of the Bible*, 7 A.B.A.J. 117 (1921).

<sup>53</sup> In the latter half of the 12th century, Faventinus based the law of nature on the Stoic-Christian philosophy. FAVENTINUS, *SUMMA ON THE DECRETUM* (A.D. 1171). See WILLIAM OF LONGCHAMP, *PRACTICA LEGUM ET DECRETORUM* (12th century), a manual of procedure based on civil law and canon law. Bracton, in *LAWS AND CUSTOMS OF ENGLAND* (circa 1240-1256), distinguished possession from ownership, contrary to Roman doctrine, and in

vided the basic doctrines of the legal system which was soon after to be administered in the Court of Chancery.<sup>54</sup>

The presence of essentially the same fundamental moral principles in Biblical law, Hindu,<sup>55</sup> Zoroastrian,<sup>56</sup> Chinese<sup>57</sup> and Stoic philosophy, Roman law, canon law, English equity and the civil law systems throughout the world, lends strong support to the theory, first advanced by Plato<sup>58</sup> and powerfully urged by Del Vecchio,<sup>59</sup> that these principles find their origin in innate impulses of human nature. Sorokin has remarked that "there have been certain universal and perennial moral and legal norms that are required to be practiced in all societies in regard to their members and which are quite necessary for the maintenance of a good life in any society or individuals. The main moral commandments of all great religions, of all legal codes, of all mores and folkways . . . are very similar, often identical."<sup>60</sup>

accordance with canon law. He felt that the law of nature was expressed in the *ius gentium*. He distinguishes between land and chattels. Obligations could be created by informal agreement, a theory first developed in the ecclesiastical courts and in Chancery. Many of the maxims of Roman law passed through the medium of canon law. See, e.g., Y.B. Mich. 1 Edw. 2, f. 3 (1307), 17 SELDEN Soc'y 5 (1903); Y.B. Trin. 1 Edw. 2, f. 2 (1308), 17 SELDEN Soc'y 186 (1903); Y.B. Mich. 3 Edw. 2, f. 15 (1309), 19 SELDEN Soc'y 110 (1904); Y.B. Hil. 3 Edw. 2, f. 9b (1310), 19 SELDEN Soc'y 176 (1904). The maxims were sometimes modified so as to bring them into accord with current conditions. WILLIAM OF LONGCHAMP, *supra*, pointed out that a claim might be stated in general expression. "Next to the Bible, no book has left a deeper mark upon the history of mankind than the Corpus Iuris Civilis." D'ENTREVES, NATURAL LAW 17 (1951).

<sup>54</sup> See Coing, *English Equity and the Denunciatio Evangelica of the Canon Law*, 71 L.Q. Rev. 223 (1955). "The canon law had borrowed its form, its language, its spirit, and many a maxim from the civil law." 1 F. POLLOCK & F. MATTLAND, THE HISTORY OF ENGLISH LAW 116 (2d ed. 1898). See also P. WINFIELD, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY 57 (1925). Thayer has observed that "while the other nations of Western Europe were beginning to adopt as their own the ultimate results of Roman legal history, England was unconsciously reproducing their history." J.B. THAYER, *The Teaching of the English Law at Universities*, in LEGAL ESSAYS 378 (1908).

<sup>55</sup> The Golden Rule in the Hindu religion: "Do naught to others which if done to thee would cause thee pain." VENKATESWARA 1517, cited in MONIER-WILLIAMS, INDIAN WISDOM 448 (1893).

<sup>56</sup> J. DAWSON, THE ETHICAL RELIGION OF ZOROASTER 125 (1931): "The golden rule; that nature alone is good which shall not do unto another whatever is not good unto its own self."

<sup>57</sup> The golden rule of Confucianism is: "Not to do unto others as you would not wish done to yourself." ANALECTS XII.ii.

<sup>58</sup> PLATO, WORKS \*294 (Jowett transl. 1937).

<sup>59</sup> Del Vecchio, *Les bases du droit comparé et les principes généraux du droit*, 12 REVUE INTERNATIONALE DE DROIT COMPARÉ 493 (1960); G. DEL VECCHIO, *Sur le Prétendu caractère politique du droit*, HUMANITE ET UNITE DU DROIT—ESSAIS DE PHILOSOPHIE JURIDIQUE 93 (1963): "Law is born naturally in the human spirit."

<sup>60</sup> P. SOROKIN, THE BASIC TRENDS OF OUR TIMES 149, 150 (1964). "Most of the equitable or discretionary ingredients which are constantly found in legal systems are inherent in the average moral sense of the community." C.

As we retrace the history of the law we come upon various terms in which these basic concepts have been expressed through the ages: the concept of righteousness of Biblical<sup>61</sup> and Hindu<sup>62</sup> law, the ideal of clemency of Greek<sup>63</sup> and Chinese<sup>64</sup> law, the Hebraic ideal of the brotherhood of men which found expression in Christianity as the concept of charity,<sup>65</sup> the concept of conscience of canon law and equity,<sup>66</sup> the concepts of reason, equity and natural justice which appear in many civil law codes,<sup>67</sup> and the concept of justice in the current draft of the Restatement of Contracts of the American Law Institute.<sup>68</sup> None of these terms, nor their aggregate effect, express the

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ALLEN, *LAW IN THE MAKING* 405 (6th ed. 1958). "The laws of every people . . . are partly common to itself, partly common to all mankind." GARUS I.1. "The justice of mankind at large . . . is rooted in the social union of the race of man." CICERO, *TUSCULAN DISPUTATIONS* I.xxv.64. Cf. Wen Tien Scien, *Song of Rectitude*, in *THE HISTORY OF THE SUNG DYNASTY* (Tien Shan Wang transl.) (unpublished manuscript by Tien Shan Wang, Berkeley, California), a compilation made under the direction of Toto, Prime Minister of the Yuan Dynasty, A.D. 418:

The earth is kept up, and the sky supported  
By the benign spirit of righteousness;  
So are the fate and the destiny of man  
And the foundation of the moral law.

Confucius (died 551 B.C.) said that the goal of mankind was to attain benevolence; Mencius (4th cent. B.C.) said that the goal of mankind was to choose righteousness. Mencius insisted on the innate goodness of human nature. See CHU CHI, *THE SACRED BOOKS OF CONFUCIUS* 95, 355 (1965).

<sup>61</sup> Isaiah 59:14 (King James) expresses such a concept, according to ISAIAH, *SONCINO BOOKS OF THE BIBLE* 290 (1949).

<sup>62</sup> *Dharma* signified righteousness in Hindu jurisprudence; see M. SETHNA, *JURISPRUDENCE* 57 (1959).

<sup>63</sup> ARISTOTLE, *NICOMACHEAN ETHICS* Bk. 5, ch. 10. The Greek word "*epieikeia*" means literally "clemency."

<sup>64</sup> Tsao, *Equity in Chinese Customary Law*, in *ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND* 21, 32 (R. Newman ed. 1962).

<sup>65</sup> See note 43 *supra*.

<sup>66</sup> Ames, *Law and Morals*, 22 HARV. L. REV. 97, 106 (1908); Vinogradoff, *Reason and Conscience in Sixteenth Century Jurisprudence*, 24 L.Q. REV. 373, 379 (1908).

<sup>67</sup> E.g., CODE CIVIL SUISSE art. 4 (Switz. Payot 1937) [hereinafter cited as SWISS CIVIL CODE]; CODE DES OBLIGATIONS art. 24 (Switz. Payot 1937) [hereinafter cited as SWISS CODE OF OBLIGATIONS]; CODE CIVILE arts. 565, 1135 (Fr. 63e ed. Petits Codes Dalloz 1964) [hereinafter cited as FRENCH CIVIL CODE]; BURGERLICHES GESETZBUCH §§ 315-19 (Ger. 22d ed. Palandt 1963) [hereinafter cited as GERMAN CIVIL CODE]; UNIFORM SCANDINAVIAN CODE art. 33; CODICE CIVIL art. 12 (Italy 1948). [hereinafter cited as ITALIAN CIVIL CODE].

<sup>68</sup> RESTATEMENT OF CONTRACTS §§ 358-80 (1932) incorporate the equitable test of good conduct, and undue hardship, applied in actions for specific performance.

RESTATEMENT (SECOND) OF CONTRACTS § 39D (Tent. Draft No. 2, 1965):

"A promise modifying a duty under a contract not fully performed on either side is binding

"(a) if the modification is fair and equitable in view of circumstances not anticipated when the contract was made; or

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total scope of conduct which has been approved in the course of legal history throughout the world as equitable. If the nature of the ethical content of equity can be more clearly defined, the principles of equity could become an effective link between legal systems, a step toward the creation of a common law of mankind.<sup>69</sup>

Before we attempt to describe more specifically the basic concepts of equity which have been identified in the Anglo-American experience and which are implicit although less clearly discernible in most civil law systems, it seems desirable to exclude some doctrines which are commonly regarded as equitable in nature but are not so in reality. In Anglo-American law a sharp distinction is drawn between relief from ordinary hardship, which falls within the province of common law actions for damages, and relief from extreme hardship, for which relief is available in suits in equity for specific relief. The doctrine of relief from extreme hardship is not, however, an exclusively equitable doctrine, since this doctrine applies to all legal norms, including those which are relevant in actions for damages. In Anglo-American law the standards of virtuous conduct which are found in equity are ordinarily applied only in the exceptional situations of extreme hardship to the victim of the unconscionable conduct. This limitation of the doctrines of pure equity arises out of the historical confinement of equitable relief to cases in which the courts of common law afforded no remedy, or no remedy which was adequate. The limitation to extreme hardship is the result of distinctions as to the jurisdiction of the courts of equity and the courts of common law, and not of distinctions based on any thought that the principles of equity were less appropriate to the determination of the rights of the parties in cases of ordinary hardship. The limitation of equitable relief to cases of extreme hardship precludes the use of equitable doctrine in a large area of legal controversies. No such distinction exists in any other system. The limitation of equitable relief to cases of extreme

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"(c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise."

If the modification is fair and equitable, why should not the court be allowed to make the modification even though the promisee is unwilling to permit it? Annot., 12 A.L.R.2d 78 (1950); Fuller, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 401-06 (1936) (second installment); Boyer, *Promissory Estoppel*, 50 MICH. L. REV. 639, 873 (1952) (second installment); Annot., 115 A.L.R. 152, (1938), supplemented by 48 A.L.R.2d 1069 (1956).

If a contract or any clause is found to be unconscionable, the court may refuse to enforce the contract or may strike any unconscionable clauses and enforce the contract as if the stricken clause had never existed. UNIFORM COMMERCIAL CODE § 2-302 (1962). See Note, *Unconscionability in Sales Contracts*, 63 YALE L.J. 560 (1954).

<sup>69</sup> "Avant de parler d'unification; il est nécessaire de coordonner entre eux les systèmes existants." Sarfatti, *Le droit comparé en fonction de l'unification du droit*, 3 REVUE INTERNATIONALE DE DROIT COMPARÉ 69, 71 (1951).

hardship was introduced into English equity, on the basis of canon law doctrine, only for reasons of expediency.<sup>70</sup> It has no relation to the question of whether or not equitable doctrine is relevant, but only to the availability of equitable remedies. Hardship alone—ordinary hardship—should be enough to bring into play the principles and remedies of equity. There is evidence of a tendency in this direction in Anglo-American law.<sup>71</sup> Nor is the principle that relief should be moulded according to the facts of each case a fundamental concept peculiar to equity. This principle manifests itself more prominently in equity because the application of the substantive principles of equity, based on moral doctrines, often makes the rules of strict law inapplicable and, since moral problems are never the same, requires that attention be given to the particular facts of each case to a greater degree than is ordinarily required in the application of the norms of strict law; but the principle that legal norms should be applied with reference to the facts of the particular case is common to all legal controversies. Finally, the doctrine of enforcement in personam is not an essential element of equity since this limitation on equitable remedies in Anglo-American law also grew out of a desire to avoid interference with the jurisdiction of the established common law courts at the time when the Court of Chancery was established. In the civil law there is no enforcement in personam, except in rare instances in German law, although the doctrines of equity and the specific enforcement of rights by other means than enforcement in personam are much more widely applied than in Anglo-American law.

It is obvious that not all moral principles which are to be found in the law fall within the exclusive province of equity.<sup>72</sup> With the progressive humanization of the law, we can no longer properly speak of strict law as law without morality, but there are still wide areas in the total jurisprudence of all legal systems in which the moral standards which have become clearly identified in Anglo-American equity have not been completely accepted. The distinction is not so much between law and morals as between the moral standards of legal norms in which the equitable standards have not been

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<sup>70</sup> This was primarily to avoid conflicts of jurisdiction with the established courts; see R. NEWMAN, *EQUITY AND LAW: A COMPARATIVE STUDY* 29 (1961).

<sup>71</sup> See, e.g., MD. ANN. CODE art. 16, § 169 (Michie 1966); UNIFORM COMMERCIAL CODE § 2-716 (1962); UNIFORM SALES ACT § 68 (1946 version); RESTATEMENT OF TORTS § 944 (1939).

<sup>72</sup> *Gee v. Pritchard*, 36 Eng. Rep. 671 (Ch. 1818). "There is no exact and well-defined line separating the moral and the legal fields." Corbin, *Rights and Duties*, 33 YALE L.J. 501, 505 (1924). Examples of the reception of moral doctrine at common law are the doctrine that agreements must be kept, and the recognition of rights of personality, protected usually by injunctive relief.

completely absorbed, and the moral standards of legal norms in which complete absorption has taken place. What we must compare is law-without-equity and law-with-equity. The nature of the moral content of equity can best be ascertained by distinguishing between the moral standards of equity and the moral standards of the rest of the law. In the civil law the comparison is difficult because the prominence of the code provisions, into which the concepts of equity have been completely integrated, tends to obscure the extent to which those concepts actually have been applied by the courts, and the existence of areas in which those concepts have been applied only imperfectly. In the Anglo-American legal system the difference between the moral standards of equity and of the common law are much more easily discernible.

When we compare the moral content of the principles of equity which have become clearly identified in Anglo-American equity, with the moral content of other legal norms, we find two different levels of moral standards. At one level are standards of conduct in which the social order, as contrasted with what Stammler has called the social interest in the individual life,<sup>73</sup> is of predominating importance, since without them life in an orderly society would hardly be possible, or could proceed only with difficulty.<sup>74</sup> Jellinek said nearly a century ago that law is the part of morals which has to do with the indispensable conditions of the social order.<sup>75</sup> Among these basic standards of virtuous conduct which fall within the province of law are the duty to respect the inviolability of person and property by refraining from causing harm intentionally or through failure to exercise due care in one's conduct or in the control of one's property, the duty to make good any harm caused intentionally or through failure to exercise due care in one's conduct or in the control of one's property, and the duty to make good any failure to carry out obligations voluntarily undertaken with full awareness of their consequences.

In these legal norms the concepts of equity have in most cases only minimal importance, and the urgent social need for universal application of the norms ordinarily precludes their modification on equitable grounds. We attribute to conduct conforming with these basic postulates of civilized life the quality of what is fair and just, because such conduct is reasonably to be expected if men are to live comfortably and to work successfully together in a crowded world. Such standards of conduct comprise what Jellinek called a minimum

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<sup>73</sup> R. STAMMLER, *LEHRE VON DEM RECHTIGEN RECHTS* 208 (1919).

<sup>74</sup> "Without justice, life would not be possible, and, even if it were, it would not be worth while." G. DEL VECCHIO, *JUSTICE* 177 (1956).

<sup>75</sup> G. JELLINEK, *DIE SOZIALETHISCHE BEDEUTUNG VON RECHT, UNRECHT UND STRAFE* ch. II (1878). Jellinek calls the excess "an ethical luxury"; but this is what equity actually supplies to the law. . .



ethic—standards to which, as he said, we may expect to give effect through legal precepts. Radbruch, refusing to concede that law is limited in all its norms to a minimum ethic, drew a distinction between different moral levels which exist within legal systems. He refers to these levels as standards of higher or lesser importance<sup>76</sup>—a division of moral standards which differs from Jellinek's classification, since it distinguishes between moral levels not on the basis of whether or not they incorporate legally enforceable standards, but within the general category of enforceable norms. This brings us closer than Jellinek has done to the distinction between the moral standards of equitable norms and the moral standards of norms of strict law. Pound, recognizing, as does Radbruch, different levels of morality within the legal order, explains the distinction on practical grounds not confined, as Jellinek felt was the case, to problems of enforcement. So long, Pound says, as legal precepts which are at variance with the requirements of morals are more than historical anomalies that ought to be pruned away, they arise from practical limitations on effective legal action which make it inexpedient in a wise social engineering to attempt to secure certain claims or enforce certain duties to an extent that might from a purely ethical standpoint be desirable.<sup>77</sup>

As long as the restraints on the adoption of moral principles arise because of problems of enforcement, the limitation of the application of moral principles in law is unavoidable, and must be tested from time to time by a continuous scrutiny of the consensus of society on moral questions. As society raises its moral sights, so must the law. The parallelism between the dynamic of social progress in morality and the moral growth of law is confirmed by history. We cannot, if law is to continue to perform its function of aiding in the attainment of social goals—the engineering function of which Pound speaks—allow the moral standards of legal norms to lag behind the accepted moral standards of the community enforceable through legal sanctions. It has been said that the force of law rests on its conformity with ethical postulates.<sup>78</sup> As Kohler has observed, "jurisprudence must appreciate the ideal ends toward which society strives."<sup>79</sup> It would be unfortunate if the law, the most effective of all institutions for social control, were to fail to play a leading role in the grand march of mankind toward the goal of human brotherhood. Sorokin

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<sup>76</sup> G. RADBRUCH, *EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT* 11-12 (9th ed. 1952).

<sup>77</sup> R. POUND, *LAW AND MORALS* 24 (1924). H. BERGSON, *THE TWO SOURCES OF MORALITY AND RELIGION* 58 (17th ed. 1956) makes a somewhat similar distinction between social solidarity and absolute justice.

<sup>78</sup> H. COING, *GRUNDZÜGE DER RECHTSPHILOSOPHIE* 18 (1947).

<sup>79</sup> J. KOHLER, *LEHRBUCH DER RECHTSPHILOSOPHIE* 32 (3rd ed. 1923).

has said that a minimum of love is absolutely necessary for the continuing existence of any society, and especially for a harmonious social order and for creative progress.<sup>80</sup> Altruistic love, in his opinion, "means the specific behavior of living forms striving . . . to be helpful to other organisms."<sup>81</sup> "Societies are held together . . . by a widespread faith in the other fellow's decency."<sup>82</sup> The most important social phenomenon of our age is the increasing re-cognition of the eternal postulate of human brotherhood.

Sorokin's theory of legal morality leads us to a second level of moral standards which is less essential to social order than the standards which are to be found at the first moral level, but which must be incorporated into legal standards unless our moral values are to be divorced from actual relations of men with one another. It is at this second level that concepts of pure equity are to be found. Since the time of Plato, philosophers have remarked on the difficulty of defining virtue. Plato said that "if one finds by inspiration a reason for virtue agreeable to truth, he will be as a living man among flitting shades."<sup>83</sup> Confucius described virtuous conduct as that which is based on reciprocity.<sup>84</sup> In Chinese customary law insistence upon one's rights was considered bad taste.<sup>85</sup> In French law virtuous conduct is described as assuring by "rules of the game" the good faith of the contract.<sup>86</sup> It has been said that "reality is never so clear-cut in its differences as the rubrics under which we dismember it for neat handling."<sup>87</sup> This leads to difficulty in formulating legal norms in which moral standards which are felt to be within the province of legal enforcement are to be expressed.

One of the world's foremost philosophers has remarked that private law has developed through a slow but continuous process of abstraction and generalization, representing the solutions worked out in individual cases. The decisions, initially based on the circumstances of each case and on an evaluation of the immediate interests in dispute, are gradually replaced by propositions based on concepts which enable them to be presented as the result of logical analysis.<sup>88</sup>

In the beginning was the "case." But every decision of a special

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<sup>80</sup> P. SOROKIN, *THE BASIC TRENDS OF OUR TIMES* 149 (1964).

<sup>81</sup> *Id.* at 154.

<sup>82</sup> A. HUXLEY, *THE PERENNIAL PHILOSOPHY* 241 (1963).

<sup>83</sup> PLATO, *MENON* (Μένων) 99-100 (transl. by the present writer).

<sup>84</sup> *ANALECTS* XII, ii.

<sup>85</sup> Padoux, *Preface* to LEANG KI-TCHAO, *LA CONCEPTION DE LE LOI ET DES THEORIES DES LEGISTES A LA VEILLE DES TSIN* (1926), quoted in J. WIGMORE, *EVIDENCE* 144 (library ed. 1928).

<sup>86</sup> G. RIPERT, *LA REGLE MORALE DANS LES OBLIGATIONS CIVILES* No. 40 (4th ed. 1949).

<sup>87</sup> W. DURANT, *OUR ORIENTAL HERITAGE* 290 (1935).

<sup>88</sup> Puig Brutau, *Realism in Comparative Law*, 3 *AM. J. COMP. L.* 42 (1954).

case is given in the conviction and with the intention that, should the case recur, it will be decided in the same way. Now it is impossible that every new case should coincide with the old in all its details, so that every decision implies not only that the one case is decided, but also that an abstract principle is evolved from the case itself by a process of abstraction in which certain special circumstances of the case are ignored. A further step, often more than one, is needed before this abstract result can be formulated in words.<sup>89</sup>

In deciding a case the judge does not approach *de novo* the problem presented by the facts before him. He takes into consideration the rules which have been developed to solve similar although never identical problems; but in selecting the rule to apply to the new case he determines the relevancy or applicability of the rule on the basis of the purposes the rule was designed to serve. He finds these purposes among a body of fundamental principles, usually few in number, and sometimes in even more basic concepts upon which the fundamental principles rest. These concepts and principles express the economic, social, political and moral interests which the law serves. The reason why one rule is to be chosen rather than another is found in the interests which the various rules have been designed to satisfy. To find the meaning of a rule of law we must look at its purpose. When the purpose of the rule is understood, its relevance or lack of relevance to the case before the court becomes clear. Individual justice does not necessitate the abandonment of rules of law; there are rules for guidance to the decision of almost all cases. The underlying principles, and the concepts upon which they are based, help the judge to choose between alternative rules of application, or to create a new rule if none of the established rules provides a satisfactory solution.

Over the centuries there have evolved in Anglo-American equity six basic principles which are the distillation of the moral experience developed in the Judaic-Christian ethos, classical philosophy, Roman law<sup>90</sup> and other sources of modern law.<sup>91</sup> These principles can be succinctly stated. Rights should be based on substance instead of form. The law will not permit the unscrupulous to carry out their plans. Fully intended agreements made with complete awareness of their possible consequences should be carried out specifically, if this is practicable and does not conflict with controlling social or individual interests. Agreements made by mistake should not be enforced unless failure to do so would have unfair effects. Benefits obtained by accident or mistake should be relinquished to those who are better entitled to them, or restitution made. The burdens of mis-

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<sup>89</sup> F. SCHULZ, *PRINCIPLES OF ROMAN LAW* 40 (1936).

<sup>90</sup> Mainly in the last title, Title 50 of the *DIGEST*, which was compiled some 300 years after their formulation in the classic period of Roman law.

<sup>91</sup> See note 50, *supra*.

fortune arising out of human relationships should be fairly distributed between the persons involved, and if necessary among the members of the community. Since these principles are the expression in law of moral precepts, it should help us to understand how the principles are to be applied if we think about them in terms of the moral precepts upon which the principles are based.

I think that in searching for the nature of equity we would do well to acknowledge its moral origin; and that to fully understand the function of the principles of equity we must look at the nature and purpose of the moral doctrines from which they have been derived. It seems not unlikely that the failure to establish a cohesive system of equity is due to the fact that the fundamental concepts cannot be classified according to the conventional division of law into branches such as contracts, quasi contracts, property and torts. I suggest that any workable system of equity must rest on a classification of rights and obligations according to concepts which have already received a well-recognized interpretation in systems of ethics and morals. Justice, in a trenchant phrase of Del Vecchio, is the legal profile of ethics.<sup>92</sup> Much labor and thought will be needed, as Percy Bordwell remarked more than 30 years ago, to have a well-knit, harmonious system of law and equity.<sup>93</sup> A glance at any equity casebook brings to mind McDougal's comment, "*Equity*. What useful purpose is served by putting this rag-bag of stuff between two covers?"<sup>94</sup> Even Hanbury, clinging compulsively to the dual system of law and equity, was obliged to confess that "the truth is that equity is still a miscellany, made up of various doctrines which sometimes seem mutually almost unrelated."<sup>95</sup> When we reduce the principles of equity to their basic elements, we find that those principles, and nearly all the rules

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<sup>92</sup> G. DEL VECCHIO, *Sur les conditions d'une vraie paix*, in HUMANITE ET UNITE DU DROIT—ESSAIS DE PHILOSOPHIE JURIDIQUE 262 (1963).

<sup>93</sup> Bordwell, *Equity and the Law of Property*, 20 IOWA L. REV. 1, 46 (1934).

<sup>94</sup> Lasswell & McDougal, *Legal Education and Public Policy*, 52 YALE L.J. 203, 255 (1943) (previously cited note 4 *supra*).

<sup>95</sup> H. HANBURY, *ESSAYS IN EQUITY* 23 (1934). The prevailing uncertainty as to the nature of equity is reflected and perpetuated by the way equity is dealt with in the law school curriculum. Where separate courses in equity are still given, they consist of a heterogeneous collection of material, much of which fits more properly into courses in property, contracts, torts, restitution or procedure. The harm in this method of teaching equity is, apart from a possible waste of curricular hours, that the heterogeneity of subject matter obscures the substantive elements. The alternative method of eliminating the separate course in equity has led to the loss of even casual attention to the substantive elements of equity and sometimes, by reason of inadequate understanding of the substantive elements, to only oblique reference to equitable remedies. The latter difficulty is avoided in many law schools by introducing a separate course in remedies. What seems to be lacking in any of these methods of instruction in equity is a thorough examination of substantive doctrine. This, it would seem, can be supplied by a one semester, 2-hour course, early in the curriculum, devoted to the substantive doctrines.

in which they have been applied—that is to say, nearly all equitable doctrine—rest upon the moral concepts of good faith,<sup>96</sup> honesty<sup>97</sup> and generosity.<sup>98</sup> These concepts, embodying the ideal of decent and honorable conduct, provide, when applied to jurisprudence, the legal counterparts of the precepts which express the ethical and moral experience of mankind. It is undoubtedly true that the descriptions of moral conduct in legal norms are not precise equivalents of the moral standards, since what are standards of voluntary conduct in ethics and morals, enforced only by public opinion or the individual conscience, become in law obligations subject to penalties for their violation. This may account for the absence of more precise terms in which to describe the corresponding legal concepts; yet, to paraphrase a remark of the late Judge Charles E. Clark, though the edges may be indefinite, their solid central core has been so often defined as to make their meaning indisputable.

### Good Faith

The requirement of good faith originated in contractual or fiduciary obligations,<sup>99</sup> but it seems analytically desirable and sound to apply the concept not only to contracts and fiduciary relationships but to all violations of confidence and even to obligations to strangers. The difference between ordinary good faith and equitable standards of good faith is well understood in Anglo-American law. The requirement of good faith at common law is largely confined, except in fidu-

<sup>96</sup> Radin has pointed out that the expression "*bona fidei contractus*" occurs in CODEX 4.54.9, 4.58.5. Radin, *The Roman Law of Quasi-Contract*, 23 VA. L. REV. 241, n.250 (1936).

<sup>97</sup> The expression "*honeste vivere*" appears in DIGEST 1.1.1.3. The term "unselfishness," to describe much the same concept as "honesty," was used by Finieux, *arguendo*, in Y.B. Hil. 4 Hen. VII, f. 5, pl 8 (1597).

<sup>98</sup> Cicero defined justice as that sentiment which maintains human solidarity with generosity and equity. CICERO, *DE FINIBUS* V., 65. Leibniz, quoted by G. MOLLAT in MITTHEILUNGEN AUS LIEBNIZENS UNGEDRUCKTEN SCHRIFTEN 14 (1887), said: "The active social participation and cooperation in furthering individual purposes demand of the individual a voluntary renunciation of the advantages that arise from separation and isolation." Kent speaks of "the obligation to deal candidly and benevolently with each other co-tenant." 4 KENT, COMMENTARIES \*371 n.(c). "Finally, private persons are said to show equity to one another, when out of the law of humanity or beneficence, they make a present of what they could exact by the force of civil laws, or else give up something of their right." 2 S. PUFENDORF, *THE ELEMENTS OF UNIVERSAL JURISPRUDENCE* 164 (W. Oldfather transl. 1931) (first published in 1660). Descartes felt that generosity is the basic moral concept. See P. MESNARD, *DESCARTES* 76 (1966).

<sup>99</sup> The ethical concept of morality was taken over into Roman law as the duty of good faith according to the nature of one's undertaking. Cf. 4 GAJUS, *ELEMENTS OF ROMAN LAW* § 62; *INSTITUTES* 4.6.33; R. POUND, *LAW AND MORALS* 7 (1924). "Common Law and equity . . . originally looked on fraud . . . as a failure in the performance of a special contractual or fiduciary duty." H. HANBURY, *MODERN EQUITY* 678 (6th ed. 1952).

ciary and confidential relationships and in a few types of contracts, to responsibility for affirmative representations of fact. Parsons, writing in 1857, said that a seller may let a buyer cheat himself *ad libitum* but must not actively assist him to so do.<sup>100</sup> The statement is still largely true in sales of real property,<sup>101</sup> and we retain in the law of sales of personal property the doctrine of "dealers' talk."<sup>102</sup> The dealer talks, of course, so that his statements will be relied upon; but even in the face of the doctrine that negligence is not a defense against misrepresentations of fact intentionally made, the doctrine of dealers' talk is allowed to weigh heavily against gullible purchasers. The equitable standard of good faith requires putting one's cards on the table; it forbids overreaching by any form of cunning,<sup>103</sup> including failure to disclose.<sup>104</sup> In equity, cheating is as reprehensible as it

<sup>100</sup> 1 T. PARSONS, CONTRACTS 461 (3d ed. 1857).

<sup>101</sup> See, e.g., *Hendrick v. Lynn*, 37 Del. Ch. 402, 406, 144 A.2d 147, 150 (Ch. 1958); *Fegeas v. Sherrill*, 218 Md. 472, 147 A.2d 223 (1958); *Swinton v. Whitinsville Sav. Bank*, 311 Mass. 677, 42 N.E.2d 808 (1942).

"It is unfortunate that when we turn to the sale or lease of real property we find that the standard is so low that no decent man would accept it as a guide." A. GOODHART, *ENGLISH LAW AND THE MORAL LAW* 119 (1955). In English law "[t]here is no duty to disclose that a field offered for sale has been sprayed with a poison deadly to animals . . . or to warn a prospective tenant that a house contains a boiler likely to explode . . ." This gap, Goodhart adds, "is recognized by almost everyone who is not a lawyer." *Id.* at 120.

<sup>102</sup> See J. DAWSON & G. PALMER, *CASES ON RESTITUTION* 268 (1958).

<sup>103</sup> As early as the eighth century B.C., Hosea said: "He is a merchant, the balances of deceit are in his hands; he loveth to oppress." *Hosea* 12:7 (King James). Cyrus said in the sixth century B.C. that the Greek market was a place where men might cheat one another under oath; see H. MULLER, *THE LOOM OF HISTORY* (1958). Examples of modern perpetuation of such standards are: inducing a person to refrain from taking precautions in reliance on the integrity of his adversary, *Banaghan v. Malaney*, 200 Mass. 46, 85 N.E. 839 (1908); *Brooks v. Conston*, 364 Pa. 256, 72 A.2d 75 (1950); taking advantage of information imparted in confidence, *Tyler v. Tyler*, 54 R.I. 254, 172 A. 820 (1934); benefitting from laches, *Talmash v. Mugleston*, 4 L.J. Ch. 200 (1826); or by the creation, even as against a stranger, of deceptive appearances, the basis of the doctrine of estoppel, *Maple v. Kussart*, 54 Pa. 348 (1866). Equitable standards of good faith are applied even in actions for damages in some types of contracts and relationships; for example, contracts of insurance, *American Life Ins. Co. v. Stewart*, 300 U.S. 203 (1937); see Wilcox, *The Evolution of the Doctrine of Concealment in Insurance Law*, 9 *Tul. L. Rev.* 449 (1935) and in relations of suretyship, see *Dering v. Earl of Winchelsea*, 29 Eng. Rep. 1184 (Ch. 1787); *Sterling v. Burdett*, [1911] 2 Ch. 418; see A. STEARNS, *SURETYSHIP* 477-99, 508 (3d ed. 1922). Similarly, in property settlements between husband and wife, see *Estate of Cover*, 188 Cal. 133, 204 P. 583 (1922).

<sup>104</sup> *Wollums v. Horsley*, 93 Ky. 582, 20 S.W. 781 (1892) (failure to disclose the probability that a railroad would be built nearby in the near future); *Hesse v. Briant*, 43 Eng. Rep. 1375 (Ch. 1856); *Clauser v. Taylor*, 44 Cal. App. 2d 453, 112 P.2d 661 (1941) (failure to disclose that property to be sold had been filled in). See *Cohen v. Citizens Nat'l Trust & Sav. Bank*, 143 Cal. App. 2d 480, 300 P.2d 14 (1956); *RESTATEMENT OF CONTRACTS* § 472(b) (1932); *RESTATEMENT OF TORTS* § 551.1 (1938); *W. PROSSER, TORTS* 701, 710 (3d ed. 1964).

is in morals, without regard to the way the cheating is done. Good faith forbids exacting a hard bargain.<sup>105</sup> The bargaining process as looked upon in equity must be a transaction between persons who are aware of all material facts and neither of whom need bargain under the pressure of controlling economic compulsion exerted by his adversary,<sup>106</sup> even though such compulsion does not amount to the common law concepts of duress or undue influence, which are found at the first moral level. Good faith extends to obligations to strangers, for example to relations between co-owners of property<sup>107</sup> and relations of suretyship<sup>108</sup> which arise without consensual agreement; to situations which give rise to estoppel<sup>109</sup> or laches;<sup>110</sup> and to cases in which property has been acquired with knowledge of rights of third persons having equities superior to the rights of the transferor, such as where the immediate transferee obtained the property by fraud,<sup>111</sup> or where the transfer was in fraud of creditors<sup>112</sup> or in violation of a trust.<sup>113</sup>

Ripert has used the striking phrase "the moralization of contracts" to describe this duty. G. RIPERT, *LA REGLE MORALE DANS LES OBLIGATIONS CIVILES* 92, 93 (2d ed. 1927).

<sup>105</sup> P. DEVLIN, *THE ENFORCEMENT OF MORALS* 47 (1965). See *McCluer v. Super Maid Cook-Ware Corp.*, 62 F.2d 426, 429 (10th Cir. 1932); *Streich v. General Motors Corp.*, 5 Ill. App. 2d 458, 126 N.E.2d 389 (1955); *State Mut. Auto. Ins. Co. v. Anderson*, 252 Iowa 1289, 110 N.W.2d 449 (1961); *Bekken v. Equitable Life Ass. Soc'y*, 70 N.D. 122, 143, 293 N.W. 200, 212 (1940); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (disclaimer of implied warranty of fitness of a new car); *Portion Pace, Inc. v. Bond*, 44 Wash. 2d 161, 265 P.2d 1045 (1954); Dawson, *Economic Duress and the Fair Exchange*, 11 TUL. L. REV. 345 (1937). In German law a price-value differential of at least one-half is utilized as a measure of unconscionableness. GERMAN CIVIL CODE § 138. *Cornblith v. Valentine*, 211 Cal. 243, 294 P. 1065 (1930) (dictum). "If a contract or any clause is found to be unconscionable, the court may refuse to enforce the contract or may strike any unconscionable clauses and enforce the contract as if the stricken clause had never existed." UNIFORM COMMERCIAL CODE § 2-302. See generally Note, *Unconscionability in Sales Contracts*, 63 YALE L.J. 560 (1954).

<sup>106</sup> See, e.g., Cal. Civ. Code § 1575: "Undue influence consists: 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him . . . ."

<sup>107</sup> See, e.g., *Clausell v. Riley*, 188 Miss. 647, 196 So. 245 (1940) (co-tenant cannot purchase an adverse interest); *Dolan v. Cummings*, 116 App. Div. 787, 102 N.Y.S. 91 (1907); J. WILLIAMS, *REAL PROPERTY* 481 (17th ed. 1894).

<sup>108</sup> *Pickersgill v. London & Provincial Marine & Gen. Ins. Co.*, [1912] 3 K.B. 614, 621; *Sterling v. Burdett*, [1911] 2 Ch. 418; *Dering v. Earl of Winchelsea*, 29 Eng. Rep. 1184 (Ch. 1787). See *Mandeville v. Solomon*, 39 Cal. 125 (1870); *Robinson v. Bledsoe*, 23 Cal. App. 687, 139 P. 245 (1914); A. STEARNS, *SURETYSHIP* 477-99, 508 (3d ed. 1922).

<sup>109</sup> See, e.g., *Jones v. Gibbon*, 155 Eng. Rep. 1626 (Ex. 1853) (estoppel to insist on prompt performance).

<sup>110</sup> *Groesbeck v. Morgan*, 206 N.Y. 385, 99 N.E. 1046 (1912).

<sup>111</sup> *Higgins v. Lodge*, 68 Md. 229, 11 A. 846 (1888).

<sup>112</sup> J. DAWSON & G. PALMER *supra* note 102, at 67 n.21.

<sup>113</sup> E.g., *Otis v. Otis*, 167 Mass. 245, 45 N.E. 737 (1897); see R. NEWMAN, *TRUSTS* 269 (2d ed. 1955).

The equitable standard of good faith applies not only to the formation of contracts but also to their performance. The promise must be kept not merely by making compensation in damages for its breach, an obligation which falls at the first moral level, but, wherever practicable,<sup>114</sup> and where the result would not conflict with the interests of the community,<sup>115</sup> specifically.<sup>116</sup> In the civil law the right to specific enforcement, called natural reparation, is primary,<sup>117</sup> the obligation being enforced by the closest approximation to personal performance by the defendant. The common law is more insistent than the civil law on implementing the defendant's obligation of specific performance, which is done by imprisonment for contempt. The civil law goes far beyond the common law, however, in enforcing obligations by natural reparation, which is done by permitting the plaintiff, or an officer appointed by the court, to carry out the defendant's obligation specifically, at the defendant's expense.<sup>118</sup> The course of dealings which has just been described is in accordance with the code of fair play of everyday ethics,<sup>119</sup> is written into the civil codes of almost all civil law systems,<sup>120</sup> and is thoroughly established in Anglo-American equity as well as in actions for damages in some branches of Anglo-American law. In most actions for damages, however, the

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<sup>114</sup> See *Beck v. Allison*, 56 N.Y. 366 (1874).

<sup>115</sup> *Rockhill Tennis v. Volker*, 331 Mo. 947, 56 S.W.2d 9 (1932).

<sup>116</sup> See R. POUND, *INTRODUCTION TO THE PHILOSOPHY OF LAW* 135 (1921), where he comments on "the introduction into the civil law of the *actio ad implendum* of Roman Law, requiring performance, with natural execution, that is, a doing by the court or its officers at the expense of the defendant, of that to which he is bound as ascertained by the judgment." See also PLANIOL & RIPERT, *TRAITÉ PRATIQUE DU DROIT CIVIL FRANÇAIS* No. 780 (1931); Judgment of June 4, 1924 (Cass Civ.) [1927] D.H. Jur. 1:136 (note Jossierand), [1925] S. Jur. III 1:97 (note Huguenay).

The common law distinguishes between redress in damages and redress by specific performance, assigning to the equitable jurisdiction the exclusive authority to order specific performance and to the common law the authority, although not exclusive, to require damages. The foregoing distinction is the basis of Holmes' statement that a contractual obligation is to pay damages if the contract is not carried out. The distinction is explained in Letter from Oliver W. Holmes to Sir Frederick Pollock, Dec. 11, 1908, in 2 HOLMES-POLLOCK LETTERS 233 (M. Howe ed. 1942).

<sup>117</sup> See Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 650 (1923).

<sup>118</sup> [1899] D.P. III 1:445. Plaintiff was authorized to tear down, at defendant's expense, a wall which obstructed plaintiff's easement over the defendant's property.

<sup>119</sup> 2 P. OERTMANN, *MOTIVES TO THE DRAFT TO THE GERMAN CIVIL CODE* 727: "What sort of morals is it according to which the judges are asked to decide? . . . [S]ome sort of general 'everyday' ethics—those ethics which are actually practiced in life; the 'moral feeling of the average citizen.'"

<sup>120</sup> E.g., GERMAN CIVIL CODE § 157; SWISS CODE OF OBLIGATIONS art. 21; OESTERREICHISCHE GESETZBUCH art. 879 (Austria 25th ed. Kapber 1955); POLISH CIVIL CODE art. 42; SCANDINAVIAN CIVIL CODE art. 31; RUSSIAN CIVIL CODE & CODE OF COMMERCE art. 33; FRENCH CIVIL CODE art. 1134.



rights of the parties are determined without reference to the norms of pure equity.

### Honesty

The equitable concept of honesty is relevant whenever benefits have been obtained gratuitously, in bad faith, or by accident or mistake under circumstances in which the acquirer would be unjustly enriched at another person's expense if the acquirer were permitted to retain the benefits. It is to be noted that the concept of honesty does not explain all cases of unjust enrichment, most of which fall within the concept of generosity, as will be explained presently. The distinction is clear; nobody except perhaps a lawyer would say that a person who insists on retaining benefits obtained through accident or mistake<sup>121</sup>—for example through payments to a person wrongly supposed to be the creditor, or delivery to the wrong person—or through gift from a defrauder or purchase from a known defrauder, was an honest man; nor would the term generosity be appropriate to describe the nature of the obligation. The return of property acquired under such circumstances would not be characterized in morals as generous conduct, nor should it be regarded in law as anything other than honesty. One is not generous in surrendering an advantage to which he is not entitled; he is merely honest. An agent or other fiduciary who gains a personal profit out of his relationship would also be acting in bad faith, as well as dishonestly, as would pledgees or mortgagees who retain from the proceeds of the sale of pledged or mortgaged property more than the total obligation due from the borrower, or a co-owner who retains income derived from the use of the entire property.<sup>122</sup> In all these situations relief is administered as part of the law of quasi contract.<sup>123</sup>

<sup>121</sup> An overpayment of rent can be recovered in California. *Corson v. Berson*, 86 Cal. 433, 75 P. 7 (1890). Payment made by mistake cannot usually be recovered in Anglo-American law. In *Norton v. Haggett*, 117 Vt. 130, 85 A.2d 571 (1952), plaintiff, intending to purchase a mortgage, had it discharged by the holder. *Held*, the holder was not liable, nor was the owner of the property, the mortgagor; the plaintiff was an officious intermeddler. According to the RESTATEMENT OF RESTITUTION § 43(1) (1936), the loss must remain where it fell. Payment of another's debt by mistake entitles the payor to restitution to the extent of the benefit conferred up to the value of what is given, unless the other disclaims the transaction.

When taxes are paid on the wrong piece of land by mistake, subrogation to the state's lien for taxes is denied. *Brookfield v. Rock Island Improvement Co.*, 205 Ark. 573, 169 S.W.2d 662 (1953); see 21 MINN. L. REV. 218 (1937); 41 MICH. L. REV. 1188 (1943). *Contra*, *Kressler v. Flynn*, 323 Mass. 610, 83 N.E.2d 876 (1949). An officious payor of another's debt cannot recover from the debtor. *W. KEENER, QUASI-CONTRACTS* 388 (1893). Officious means that he had no interest to protect. *Irvine v. Angus*, 93 F. 629 (9th Cir. 1899).

<sup>122</sup> *Pico v. Columbet*, 12 Cal. 414 (1859).

<sup>123</sup> Quasi contractual obligations, resting on unjust enrichment, although they are really delictual in their nature and origin, became separately classi-

### Generosity

Of the moral precepts of good faith, honesty and generosity, upon which nearly all equitable doctrine rests, the precept of generosity is the most important and pervasive. The jurisprudential basis for the application of this moral precept in law through the mediation of equity has been definitively set forth by Stammler, one of the towering figures of the Neo-Kantian School. Stammler's concept of just law, based on the concept of human brotherhood embodied in the Golden Rule, is formulated in terms of the ideal community. His definition of neighbor is taken from the parable of the good Samaritan, who finds his neighbor to be the one who is in need. Stammler's formula of the ideal community comprehends not only the whole social community but the inner community composed of persons who have entered into or have become bound by relationships which are subject to the operation of legal norms. In such relationships the party injured and the party who has injured the other are united in a separate community; the interests of these members of the inner community must be adjusted in accordance with the principles of just law. These principles require sacrifice on the part of the person who has been injured by the action of the other, but not to the extent of being himself excluded from the reciprocal obligation of the one who has caused the injury. This is what Stammler means by his phrase that every man remains his own neighbor, that is, an end in himself. The principles of the ideal community thus recognize the propriety of protection of the rights which have been invaded as well as the propriety of enduring the loss arising from the misfortune which has occurred. The loss must be divided; this is the social ideal.<sup>124</sup>

The equitable concept of generosity requires the relinquishment of, or compensation for, benefits acquired or positions of advantage arising out of services rendered or consensual agreements or from ownership of property, and requires compensation for unsuccessful efforts to provide assistance. The concept also applies to situations which require affirmative action where a slight effort would prevent a great loss to another person. Obligations of this nature fall into

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fied, first in Roman law and later in English law because of procedural difficulties of enforcement in both systems. The separate classification is firmly established in both common and civil law. The medieval glossators treated quasi contractual obligations as equitable, basing them on the same concept of *bona fides* which was the basis of obligations arising out of contract. Although this explanation is subject to logical criticism because of the non-consensual nature of quasi contractual obligations, the classification as equitable is justified from the viewpoint of moral content, because these obligations fall within the second moral level, since legal condemnation of their violation is not essential to the social order but rests on the mandate of a more exacting social conscience

<sup>124</sup> R. STAMMLER, *WIRTSCHAFT UND RECHT* 600 (2d ed. 1906).

four broad classifications which cut across the conventional subdivisions of law into contracts, quasi contracts, property and torts. One of these categories consists of cases in which the assertion of a right would be of no material benefit, or of only relatively slight benefit. Examples are cases of encroachments which are harmless to the property owner but the removal of which would entail great hardship to the encroacher;<sup>125</sup> cases of ameliorating waste;<sup>126</sup> delayed performance of contractual obligations where the damage caused by the delay can be adequately compensated for;<sup>127</sup> and relief for failure to comply with formal requirements of law, as for example where there has been part performance of an oral contract for the sale of land.<sup>128</sup>

Another category of obligations in which the concept of generosity is relevant comprises cases in which only a comparatively trifling effort or expenditure is required to avert serious hardship to another person. Such cases present the principle of mitigation of damages by reducing the loss. Examples are the requirement in a few states that a landlord make reasonable efforts to re-let premises abandoned by his tenant before the end of the lease;<sup>129</sup> the requirement that a buyer make reasonable efforts to re-sell perishable goods which have been rejected by him;<sup>130</sup> the obligation of a tenant to make trifling repairs to avert a serious deterioration of the premises, the doctrine of permissive waste;<sup>131</sup> the responsibility of involuntary bailees not to unreasonably endanger the bailed property;<sup>132</sup> and the

<sup>125</sup> *Johnson v. Killian*, 157 Fla. 754, 27 So. 345 (1946) (court refused to order removal of concrete wall inadvertently constructed 1 foot inside plaintiff's property); *Thomas v. Evans*, 105 N.Y. 601 (1887) (unintentional encroachment of house 18 inches on plaintiff's driveway; injunction denied).

<sup>126</sup> *Melms v. Pabst Brewing Co.*, 104 Wis. 7, 79 N.W. 738 (1899).

<sup>127</sup> *King v. Connors*, 222 Mass. 261, 110 N.E. 289 (1915).

<sup>128</sup> *Allen v. Moore*, 30 Colo. 70 P. 682 (1902); see Cardozo, *Comments*, in *LAW AND PHILOSOPHY* 333 (S. Hook ed. 1964) (on the search to escape the effects of the Statute of Frauds).

<sup>129</sup> *E.g.*, *Marmont v. Axe*, 135 Kan. 368, 10 P.2d 826 (1932); *Patton v. Milwaukee Commercial Bank*, 222 Wis. 167, 263 N.W. 124 (1936). The overwhelming weight of authority, however, is *contra*; see, *e.g.*, *Boardman Realty Co. v. Carlin*, 82 Conn. 413, 74 A. 682 (1919); *McGrath v. Shalett*, 114 Conn. 622, 159 A. 633 (1932); *Richards v. Libby*, 136 Me. 376, 10 A.2d 609 (1940); *McCormick, The Rights of the Landlord upon Abandonment of the Premises by the Tenant*, 23 MICH. L. REV. 211 (1925) (favors the imposition of a duty on the landlord to make a reasonable effort to re-let).

<sup>130</sup> A rescinding purchaser must, if the seller refuses to take back the goods, save unnecessary loss by selling them if they are perishable. *UNIFORM COMMERCIAL CODE* § 2-603. On the seller's duty respecting perishable goods which have been refused, see S. WILLISTON, *SALES* § 559 (3d ed. 1948). The seller must exercise his right to resell with reasonable care and judgment. *UNIFORM SALES ACT* § 60(5).

<sup>131</sup> *Suydam v. Jackson*, 54 N.Y. 450 (1873); *Townsend v. Moore*, 33 N.J.L. 284 (Sup. Ct. 1869).

<sup>132</sup> *Cowen v. Pressprich*, 117 Misc. 663, 192 N.Y.S. 242 (Sup. Ct.), *rev'd*, 202 App. Div. 796, 194 N.Y.S. 926 (1922).

requirement of marshalling assets of an insolvent debtor for the benefit of sureties or guarantors.<sup>133</sup>

A third category consists of cases which require payment for benefits obtained by services rendered, or improvements of property made, without valid prior authorization. In such situations there are no contract rights which, according to strict interpretation of the rights which are involved, would justify the retention of the benefits without making restitution. Examples of situations falling within this category are cases of improvement of property by mistake,<sup>134</sup> services rendered without proper authorization under a mistake of fact,<sup>135</sup> services rendered in an emergency to protect life<sup>136</sup> or property,<sup>137</sup> burial of the dead,<sup>138</sup> necessities furnished to minors or incompetents for whom another person is responsible,<sup>139</sup> and unauthorized use of property.<sup>140</sup> Relief in these situations is provided in the law of quasi contracts or contracts.

A fourth category is made up in part of cases in which benefits have been received in the course of consensual relationships, and in which, therefore, the retention of benefits would be justified according to strict law, and in part of cases arising out of delictual encoun-

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<sup>133</sup> A. STEARNS, *SURETYSHIP* 238 (1951).

<sup>134</sup> See Thurston, *Recent Developments in Restitution: 1940-1947*, 45 MICH. L. REV. 935, 950-53 (1947); Annot., 24 A.L.R.2d 11 (1950); Note, *Good Faith and the Right to Compensation for Improvements on Land of Another*, 6 W. RES. L. REV. 397 (1955); 48 MICH. L. REV. 885 (1950); F. WOODWARD, *QUASI CONTRACTS* 187 (1913).

<sup>135</sup> See J. POMEROY, *EQUITY JURISPRUDENCE* § 1241 (5th ed. 1941).

<sup>136</sup> There is a duty to help in the Netherlands, Norway, Germany, and France. See Dawson, *Rewards for the Rescue of Human Life?*, Festschrift YNTEMA 142 (1961); WOODWARD, *supra* note 134, at § 191; FRENCH CIVIL CODE arts. 1372-75; ITALIAN CIVIL CODE arts. 1141-44. A physician was held to be entitled to recover against parents who had not objected to his services to their daughter. *Greenspan v. Slate*, 12 N.J. 426, 97 A.2d 390 (1953); see 39 CORN. L.Q. 337 (1954).

<sup>137</sup> Recovery in quasi contract was allowed for contractors who repaired holes in the roof of a business building on which they were working, although this work had not been authorized by the absentee owner. *Berry v. Barbour*, 279 P.2d 335 (Okla. 1954); see 53 MICH. L. REV. 1013 (1955); J. DAWSON & G. PALMER, *supra* note 102, at 582. Maritime salvage operations: *Robinson, The Admiralty Law of Salvage*, 23 CORN. L.Q. 229 (1938); Lorenzen, *The Negotiorum Gestio in Roman and Modern Civil Law*, 13 CORN. L.Q. 190 (1928); J. DAWSON, *UNJUST ENRICHMENT* 136 (1951).

<sup>138</sup> F. WOODWARD, *supra* note 134, at § 205.

<sup>139</sup> *Id.* at § 202(2).

<sup>140</sup> *Bright v. Boyd*, 4 F. Cas. 134 (C.C.D. Me. 1843); see J. DAWSON & G. PALMER, *supra* note 102, at 552 referring to a case involving a suit for the value of use and occupation, in which deduction for the value of improvements made under mistake as to ownership was allowed. Where the owner acquiesces in the improvement without objection, the improver was allowed to recover in *Olin v. Reinecke*, 336 Ill. 530, 168 N.E. 676 (1929); see Annot., 76 A.L.R. 304 (1932) (citing cases in accord with *Olin, supra*). For decisions under statutes, see Annot., 137 A.L.R. 1078 (1942).

ters. This category requires not merely the relinquishment of rights or payment for benefits received, but requires assuming or sharing the burden resulting from accident or mistake.<sup>141</sup> Examples in the area of consensual relationships are unilateral mistake in contracting,<sup>142</sup> frustration of the contractual purpose,<sup>143</sup> performance of unenforceable contracts,<sup>144</sup> cases of part performance of contracts prior to default,<sup>145</sup> or where complete performance has become impossi-

<sup>141</sup> "Sacrifices in various directions is one of the commonplace facts of our social structure, and we now assume, a normal fact." W. HOCKING, *THE PRESENT STATUS OF THE PHILOSOPHY OF LAW AND OF RIGHTS* 27 (1926).

<sup>142</sup> *E.g.*, *M. F. Kemper Construction Co. v. Los Angeles*, 37 Cal. 2d. 696, 235 P.2d 7 (1951); *Goodrich v. Lathrop*, 94 Cal. 56, 29 P. 329 (1892) (purchase of the wrong lot); *Cleghorn v. Zumwalt*, 83 Cal. 155, 23 P. 294 (1890) (contract called for a one-fifth interest rather than three-fourths as intended); *Watkins v. Carrig*, 91 N.H. 459, 21 A. 591 (1941) (ignorance of bed of solid rock to be extracted); *Welles v. Yates*, 44 N.Y. 525 (1871) (conveyance of land without reservation of timber, as had been intended); *Ashworth v. Charlesworth*, 119 Utah 650, 231 P.2d 724 (1951) (contract to supply, install, and paint a structural steel bridge priced too low because of a mistake as to the size of the bridge). See Annot., 1 A.L.R.2d 9 (1948); Comment, *Present Day Labor Litigation*, 30 YALE L.J. 501, 506 (1921). If the risk is assumed, rescission will be denied.

<sup>143</sup> *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 45 (1916) (relief given at law); *Dailey v. Clark*, 128 Mich. 591, 87 N.W. 761 (1901); *Bergsted v. Bender*, 222 S.W. 547 (Tex. Comm. App. 1920). See A. CORBIN, *CONTRACTS* § 156 (1951); *Griel v. Mabson*, 179 Ala. 444, 60 So. 876 (1912).

<sup>144</sup> *Minsky's Follies v. Sennes*, 206 F.2d 1 (5th Cir. 1953). In *First Nat'l Bank v. Oberne*, 121 Ill. 25, 7 N.E. 85 (1886) the court held that benefits received by defendant from plaintiff, who had thought that he had a contract with defendant, although the person he dealt with was in fact without authority to bind the defendant, cannot be recovered. *Accord*, *Purvis v. Martin*, 122 Me. 73, 118 A. 892 (1922). See *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397 (1881); *Dresser v. Kronberg*, 108 Me. 423, 81 A. 487 (1911); *Jensen v. Provost*, 174 Ore. 143, 148 P.2d 248 (1944); Annot., 104 A.L.R. 577; Annot., 1916D L.R.A. 895; 47 L.R.A.N.S. 639 (1912); *RESTATEMENT OF RESTITUTION* § 42 (1936); *Thurston*, *supra* note 134; *Norton v. Haggert*, 117 Vt. 130, 85 A.2d 571 (1952).

<sup>145</sup> W. KEENER, *QUASI-CONTRACTS* 227 (1893). A contracting party in default may recover the amount of the actual benefit conferred on the other party, 5 A. CORBIN, *CONTRACTS* § 1114 (2d ed. 1964); *RESTATEMENT OF CONTRACTS* § 357 (1932); see *Amtorg Trading Corp. v. Miehle Printing & Pub. Co.*, 206 F.2d 103 (2d Cir. 1953); Annot., 11 A.L.R.2d 701 (1950); *Thurston*, *supra* note 134, at 950-53. There is less readiness to recognize the buyer's claim. See J. DAWSON & PALMER, *supra* note 102, at 443. Recovery on a building contract in spite of nonsubstantial deviations is allowed, Note, 31 COLUM. L.R. 307 (1931); cf. *Jacobs & Young v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1923). The right to restitution depends on whether the breach was "willful and deliberate." *RESTATEMENT OF CONTRACTS* § 357 (1932). In *Niman v. Story*, 213 Mich. 397, 181 N.W. 1017 (1921), a purchaser who had paid a substantial amount for a piano purchased by him under a conditional bill of sale was denied recovery of the sums he had paid, on his default in payment of the balance of the purchase price. See J. DAWSON & G. PALMER, *supra* note 102, at 448. If the default was willful, recovery is denied. F. WOODWARD, *supra* note 134, at § 175(2). Otherwise recovery is allowed even if the breach was substantial. F. WOODWARD, *supra* note 134, at § 175.

ble,<sup>146</sup> or of contracts which have been rescinded for misrepresentation or breach of warranty,<sup>147</sup> and cases which present the problem of balancing hardship in granting or denying decrees for specific performance or injunctions.<sup>148</sup> In the area of delictual encounters, this basis of equitable obligation is applicable in connection with the problem of balancing interests affected by the creation of nuisances,<sup>149</sup> in cases of concurrent fault, and in cases of products liability. Products liability for damage without fault is imposed either on the ground of an enforced assumption, by the purveyor of the product, of the risk of injury caused by the product,<sup>150</sup> or in situations in which the loss can be shifted to the community, through increased prices, from the person who is held directly responsible.<sup>151</sup> An example in public law is workmen's compensation statutes, which shift the burden of accidental injury to the community, through taxes. Concurrent fault requires the sharing of responsibility for accidents to which the negligence of each party was a contributing factor.

It will be seen that the concepts of honesty and generosity cover two classes of unjust enrichment. The concept of honesty applies to cases of unjust enrichment where there has been no prior agreement between the persons concerned for the adjustment of their interests, a situation where the enrichment would be unjustified even at strict law. The concept of generosity applies in cases where the possibility

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<sup>146</sup> *Tainter v. Cole*, 120 Mass. 162 (1878); *Milkman v. Ordway*, 106 Mass. 232 (1870); *Sternberg v. O'Brien*, 48 N.J. Eq. 370 (ch. 1891); *Fenton v. Clark*, 11 Vt. 557 (1839) (employee forced by illness to stop work before the end of a 4-month contract; recovery in quasi contract granted); see *F. Woodward*, *supra* note 134, at § 112.

<sup>147</sup> *American Pure Food Co. v. Elliott*, 151 N.C. 393, 66 S.E. 451 (1909); *J. Dawson & G. Palmer*, *supra* note 102, at 246. A profit which a purchaser would have made if the contract had been performed, is excluded in the case of his rescission for fraudulent misrepresentations or breach of warranty by the vendor. A vendee's lien on land after rescission for failure of title will not include lost profits. See *Annot.*, 120 A.L.R. 1154 (1939). But see *Holdern v. Efficient Craftsman Corp.*, 234 N.Y. 437, 138 N.E. 85 (1923); *Miswalde-Wilde Co. v. Armory Realty Co.*, 210 Wis. 53, 243 N.W. 492 (1933).

<sup>148</sup> *Madison v. Ducktown Sulphur & Iron Co.*, 113 Tenn. 331, 83 S.W. 658 (1904) (injunction against continued operation of plant denied, because damage to plaintiff's crops from fumes would afford substantial relief, and closing plant would cause economic suffering to the community).

<sup>149</sup> *Crabtree v. City Auto Salvage Co.*, 47 Tenn. App. 616, 340 S.W.2d 940 (1960) (only excessive dust and noxious odors prohibited); *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, 83 S.W. 658 (1904).

<sup>150</sup> See *Cowan, Some Policy Bases of Products Liability*, 17 *STAN. L. REV.* 1077 (1965).

<sup>151</sup> *A. DENNING, THE ROAD TO JUSTICE* 116 (1955): "The law must adopt a new test. Not 'whose fault was it?' but 'on whom should the risk fall?' . . . They should cover themselves by insurance against it." See *Cowan, supra* note 150, at 1088 (risk of loss shifted from consumer to producer); *Patterson, The Appointment of Business Risks Through Legal Devices*, 24 *COLUM. L. REV.* 335, 358 (1924); *Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *YALE L.J.* 1099, 1120 (1960).

of such eventual enrichment was inherent in a prior consensual agreement, a situation in which the enrichment would according to strict law be justified.<sup>152</sup>

There is a wide divergence between the common law and the civil law as to the desirability of introducing into legal norms standards at the second moral level. In the civil law the standards of conduct required by the concepts of good faith, honesty and generosity are accepted without qualification. The acceptance of these standards has not impaired to any perceptible extent the element of certainty either in the civil law or in the areas of common law in which such acceptance has occurred: trusts, quasi contract, fraud, and contracts of insurance and suretyship. In other areas of the common law they have been received only imperfectly and sporadically. Civil law systems have applied the standards of good morals without particularizing to any great extent as to the kinds of immoral conduct which the law condemns; the law of torts is compressed within five terse articles of the French Civil Code. Rights and duties are less minutely classified than in the common law, leaving more room for discretion in the application of the norms. The merit of this approach is that moral concepts are enforced as elements of legal norms to a much greater extent than in the common law. The disadvantage is that the question of what are the standards of virtuous conduct which ought to be applied in a given situation is left to judicial discretion to a much greater extent than is the case in Anglo-American law.

The acceptance of the moral standards of equity constitutes the outstanding merit of the civil law. Its extension to many parts of the world may be explained not only by its simplicity but by its appeal to universal criteria of justice. The uneven application of the principles of pure equity in Anglo-American law violates both logic and common sense. Either it is right for the law to give relief from hardship due to accident, mistake, unfairness or misfortune, or it is not. If it is not right, then the law should not give relief even when the plaintiff seeks relief through a decree for specific performance or an injunction, rather than damages. If it is right to give relief under such circumstances, then the law should also give relief when the plaintiff sues for damages, which are merely a substitutionary remedy for injury caused by the breach of a legal duty. As Chafee has said, "suits for

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<sup>152</sup> Such classification of quasi contractual liability may help to reduce the uncertainty which has been expressed by jurists in different parts of the world as to the basis of unjust enrichment. "The most obvious comment about the American law of restitution is that it lacks any kind of system. . . . The price we pay for this includes, among other things, a serious and growing confusion in analysis, a lack of overall intelligibility, and much difficulty in prediction." Dawson, *supra* note 136, at 112. "The concept [of unjust enrichment] remains badly defined." G. RIPERT, *LA REGLE MORALE DANS LES OBLIGATIONS CIVILES* No. 133 (4th ed. 1949).

breach of contract involve morality, within the proper limits of its application in a courthouse, just as much as suits for specific performance."<sup>153</sup> If a person who has cheated another person is not to be allowed to obtain specific property by such means, he should not be given damages. Reasoning, as Pound has pointed out, is largely a process of comparison.<sup>154</sup> We have become accustomed to compare principles of equity with principles of law by taking as the basis of comparison the difference in the remedy which is sought or available, depending on whether the action is for damages or for specific relief. We apply the tests of fair play or of unilateral mistake, in suits for specific relief, and different tests, fraud or mutual mistake, when the action is for damages; we do this without realizing that in both kinds of actions the objective is to enforce standards of fair dealing or contracts which have been intelligently undertaken, with proper consideration for the hardship to others if these equitable considerations were to be applied.

Each system, common law and civil law, has much to learn from the other. The situations in which equity has not been successfully absorbed into the norms of civil law are sufficiently numerous<sup>155</sup> to justify even civilian lawyers and jurists in giving consideration to the results of the Anglo-American experience. The civil law can use the clearly defined principles of Anglo-American equity as a guide to ascertain the extent of the actual reception of moral doctrine and as a basis for correction in areas in which the reception has been imperfect. The common law can profit from the much more successful experience of the civil law in applying the principles of pure equity in all situations in which they are relevant, without regard to whether or not the rights of the parties can be enforced specifically. In both systems equity may usefully be employed to harmonize what Pound has called "the fragments of law lying on the surface of the legal order"<sup>156</sup> into "the developing universal law of today."<sup>157</sup> It has been said that "the mind of man is not passive wax upon which experience and sensation write their absolute and yet whimsical will; it is an active organ which moulds and coordinates sensations into ideas, an organ which transforms the chaotic multiplicity of experience into

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<sup>153</sup> Z. CHAFEE, SOME PROBLEMS OF EQUITY 29 (1950).

<sup>154</sup> R. POUND, LAW FINDING THROUGH REASON AND EXPERIENCE 46 (1960).

<sup>155</sup> I have referred to some of these areas of imperfect reception of equity in the civil law in *La Nature de l'équité en "droit civil,"* 60 REVUE INTERNATIONALE DE DROIT COMPARE 289 (1964); and in *Funzione della pura equità nel diritto moderno,* 40 REVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 647 (1963).

<sup>156</sup> Preface to R. POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW VII-VIII (Rev. ed. 1954).

<sup>157</sup> Pound, *What Do We Ask of Legal History?*, 11 AM. U.L. REV. 117, 121 (1962).



the ordered unity of thought.”<sup>158</sup> In both legal systems equity provides a compass by which the course of the law may be charted into channels of humane and compassionate justice. The hidden equity, like God’s law, is not far off;<sup>159</sup> it lies in the conscience of mankind.

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<sup>158</sup> *Preface to KANT, CRITIQUE OF PURE REASON* xxix.

<sup>159</sup> *Deuteronomy* 30:11, 14 (King James): “For this commandment which I command thee this day, it is not hidden from thee, neither is it far off. . . . But the word is very nigh unto thee, in thy mouth, and in thy heart, that thou mayest do it.”